IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT :

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

FRIDAY, THE 13TH APRIL 2007 / 23RD CHAITHRA 1929

OP.No. 18323 of 2002(F)

PETITIONERS:
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1. V.I. SANTHAMMA, U.D. CLERK, OFFICE OF THE DISTRICT EDUCATIONAL OFFICER, ERNAKULAM.

2. K.A. RAMANKUTTY, U.D. CLERK, OFFICE OF THE DISTRICT EDUCATIONAL OFFICER, MUVATTUPUZHA, ERNAKULAM DISTRICT.

3. K.C. JAMES, U.D.CLERK, OFFICE OF THE DISTRICT EDUCATIONAL OFFICER, MUVATTUPUZHA, ERNAKULAM DISTRICT.

4. K. GOPI, U.D. CLERK, OFFICE OF THE DIRECTOR OF PUBLIC INSTRUCTION, THIRUVANANTHAPURAM.

5. RAJAN. T., U.D. CLERK, OFFICE OF THE ASSISTANT EDUCATIONAL OFFICER, CHAVARA, KOLLAM DISTRICT.

6. K. VASUDSEVAN, U.D. CLERK, OFFICE OF THE ASSISTANT EDUCATIONAL OFFICER, KUNDARA, KOLLAM DISTRICT.

7. C.K. RAVEENDRAN, U.D. CLERK, OFFICE OF THE DISTRICT EDUCATIONAL OFFICER, KOLLAM.

8. K. ASHSTAMOORTHY NAMPOOTHIRI, U.D. CLERK, OFFICE OF THE ASSISTANT EDUCATIONAL OFFICER, CHANGANACHERRY, KOTTAYAM DISTRICT.

BY ADV. SRI.C.T.RAVIKUMAR

RESPONDENTS:
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1. STATE OF KERALA, REPRESENTED BY
THE SECRETARY TO GENERAL EDUCATION,
SECRETARIAT, THIRUVANANTHAPURAM.

2. THE DIRECTOR OF PUBLIC
INSTRUCTION, THIRUVANANTHAPURAM.

3. Y. GIRIJA, U.D. CLERK,
OFFICE OF THE DIRECTOR OF PUBLIC
INSTRUCTION, THIRUVANANTHAPURAM.

BY GOVERNMENT PLEADER SHRI. SANDESH RAJA FOR R1&R2

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 14/03/2007, ALONG WITH OP NO. 25863 OF 2002 THE COURT ON 13/4/2007 DELIVERED THE FOLLOWING:

OP 18323/02

APPENDIX

PETITIONERS' EXTS

EXT.P1 TRUE RELEVANT EXTRACT OF ORDER NO.05/143660/85/DPI DT. 19.2.86 OF THE SECOND RESPONDENT.

EXT.P2 TRUE RELEVANT EXTRACT OF ORDER NO.C5/25890/86/DPI DATED 11.8.96 OF THE SECOND RESPONDENT.

EXT.P3 TRUE RELEVANT EXTRACT OF ORDER NO.C5/8437(i)/89/DPI DATED 1.11.1989 OF THE SECOND RESPONDENT.

EXT.P4 TRUE RELEVANT EXTRACT OF THE SENIORITY LISTPUBLISHED BY ORDER NO.SY2/114535/87 DATED 14.6.1996 OF THE 2ND RESPONDENT.

EXT.P5 TRUE COPY OF CIRCULAR NO.SY2/14206/97/DPI DT. 11.3.98 OF THE SECOND RESPONDENT.

EXT.P6 TRUE COPY OF NOTICE NO.14296/97/DPI DT. 11.3.98 OF THE SECOND RESPONDENT TOGETHER WITH THE RELEVANT EXTRACT OF THE PROPOSAL CONTAINING THE CHARGES IN THE SENIORITY LIST.

EXT.P7 TRUE COPY OF NOTICE NO.SY2/114535/90 DATED 1-4-02 OF THE SECOND RESPONDENT TO THE 1ST PETITIONER.

EXT.P8 TRUE COPY OF NOTICE NO.SY2/114535/90 DATED 1.4.92 OF THE SECOND RESPONDENT TO THE 6TH PETITIONER.

EXT.P9 TRUE COPY OF THE REPLY DATED 17.4.02 OF THE 1ST PETITIONER TO THE SECOND RESPONDENT.

EXT.P10 TRUE COPY OF THE ORDER NO.5127/33829/2002 DATED 23.5.2002 OF THE 2ND RESPONDENT TO THE 7TH PETITIONER.

EXT.P11 TRUE COPY OF ORDER NO.SY2/11435/90 DATED 17.6.02 OF THE SECOND RESPONDENT.

EXT.P12 TRUE COPY OF THE LETTER NO.SY2/67220/99/DPI DATED 30.9.99 OF THE SECOND RESPONDENT.

Antony Dominic, J.

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O.P.Nos.18323 & 25863 of 2002

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Dated this the 13th day of April, 2007.

JUDGMENT

Prayers in these Original Petitions are to declare that the petitioners are entitled to retain 16.9.1985 as their date of promotion into the cadre of U.D. Clerks in the General Education Department and the consequential ranking in the seniority list of U.D. Clerks in the Department for the period from 1.12.1983 to 31.12.1985. They also seek to quash Ext.P11 in O.P.No.18323 of 2002, which is also produced in O.P.No.25863 of 2002 as Ext.P5. For the sake of convenience, I am referring to the facts as stated in O.P.No.18323 of 2002.

2. The facts which led to the filing of these Original Petitions are that the petitioners herein were selected by the Kerala Public Service Commission and were advised for appointment as L.D. Clerks in the General Education Department and accordingly, joined the post on various dates in 1983 and 1984. Subsequent to their entry into the service, by order dated 16.9.1985, the Government changed the ratio between L.D. Clerks and U.D. Clerks into 1:1 with effect from

16.9.1985 as against the then existing ratio of 2:1. Consequently, with effect from 16.9.1985, 597 additional U.D. posts were created. However, enough test qualified L.D. Clerks were not available in the Department as on 16.9.1985, as a result thereof, those who were ineligible to be promoted, in terms of the provisions contained in the Kerala State and Subordinate Services Rules, (hereinafter referred to as 'K.S. & S.S.R.'), were also promoted to some of the newly created U.D. Posts. Petitioners 1, 4 and 6 were promoted and by Exts.P2 and P3, petitioners 2,3,7 and 8 were promoted. It is stated that consequent thereto consequential benefits were paid with effect from 16.9.1985, the services were reckoned for increments, grade promotion, etc. and seniority was also assigned on that basis, except in the case of the seventh petitioner. According to the petitioners, the seniority list for the period from 1.7.1979 to 31.12.1985 was published on 10.3.1989. There were complaints and objections mainly that inter district transferees were improperly assigned seniority. This led to the necessity of rectifying the mistakes and accordingly, Ext.P4 seniority list was published assigning the petitioners, except the seventh petitioner, seniority in the grade.

3. It is stated that even thereafter, Ext.P5 circular was issued pursuant to a direction from the Government for refixing the rank and

seniority of the third respondent. Thereafter, the Controlling Officers were instructed to serve notice to all individuals likely to be affected and this led to the issuance of Ext.P6, enclosing the proposal for the changes. It is stated that though objections were filed to Ext.P6, no action was taken. After a long lapse of time, Exts.P7 and P8 notices were issued again proposing to revise the seniority, which was also responded by the petitioners and Ext.P9 is stated to be one of those objections. To cut a long story short, finally, Ext.P11 was issued by the second respondent ordering to revise the seniority and upholding the objections, which had the effect of upsetting the seniority assigned to the petitioners as per Ext.P4. It is in the above factual background that these Original Petitions have been filed seeking the reliefs mentioned above.

4. A counter affidavit has been filed by first respondent – State of Kerala, contending inter alia that for promotion as U.D. Clerk, satisfactory completion of probation is a mandatory condition in terms of K.S. & S.S.R. and that L.D. Clerks will be on probation for two years of duty within a continuous period of three years. According to the respondent, besides completion of probation, one has to pass Account Test (Lower) and K.E.R. for promotion as U.D. Clerk. An exemption has been made in the case of members belonging to Scheduled Castes

and Scheduled Tribes, who were in service on 31.12.1985. But even in their case, they are bound to complete two years of duty period required for regular promotion in terms of Rule 28(a)(1) of K.S. & S.S.R. The counter affidavit proceeds to state that 597 posts of L.D. Clerks were converted as U.D. Clerks with effect from 16.9.1985 and those posts could not be filled up on a regular basis for want of sufficient number of qualified hands. Hence, according to the respondent, after promoting those who stood qualified on the date of occurrence of vacancies, remaining vacancies were filled up provisionally under Rule 31 of K.S. & S.S.R. and that the petitioners in the Original Petition are those, who were provisionally promoted in the above background. Answering the contention that their service has been taken for increment, grade promotion, etc., it is stated in the counter affidavit that all promotees are eligible for pay and allowances attached to the post, increment, grade, etc. But they are eligible for seniority only with effect from the date on which they become qualified for regular promotions. It is averred that since all the petitioners were promoted as U.D. Clerks, even if it was provisional, they were also included in Ext.P4, which according to the respondent, was again only a provisional list and that aggrieved by the ranking therein, representations were made to the Government and on that basis,

revision was necessitated and Exts.P5 and P6 circulars were issued. In their attempt to explain the allegation of subsequent delay, it is stated that before proceeding further, the Government cancelled letter dated 23.12.1997 in this regard, as a result of which follow up action could not be pursued. It is stated that thereafter, the matter was proceeded with and notices were issued to those persons, who were likely to be affected. It is stated that all except the seventh petitioner availed of the benefit. It is stated that finally Ext.P11 was published after hearing all those who had not completed two years of duty on the date of occurrence of vacancies. According to the respondent, all the petitioners and similarly placed persons were irregularly promoted with effect from 16.9.1985 as they had not completed the minimum duty period of two years required for the completion of probation. It is stated that taking into account the mistake so committed by the respondent, in order to avoid hardship, it was decided not to revert the petitioners, who are still enjoying the benefit of promotion, higher pay, higher rate of increment, grade etc. Answering the plea of the petitioners that they are going to be superceded in violation of Rule 28 (a)(1) of K.S. & S.S.R., it is stated that the Rule in question has relevance only when juniors, who have got their probation declared earlier than the seniors are promoted overlooking the senior

probationers. In this case, it is stated that none of the petitioners are seniors and no juniors to them were promoted. Although it is stated that all the petitioners except the eighth petitioner are eligible for exemption from test qualification for promotion, they are bound to satisfy the requirement of Rule 28(a)(1) of K.S. & S.S.R. by completing the minimum duty period required for the satisfactory completion of probation for promotion. According to the respondent, revision of seniority was necessitated in the above background and therefore, has to be upheld by this Court.

5. During the hearing, on behalf of the petitioners, arguments were raised mainly re-iterating the contentions in the Original Petitions, according to them, revision of seniority effected as per Ext.P11 on 17.6.2002 has the effect of upsetting the seniority of the petitioners with effect from 16.9.1985 and therefore, such revision of seniority ought not have been effected. It is stated that matters of settled seniority cannot be allowed to be upset after long number of years affecting the vested right of the employees. It is their further contention that the petitioners were all otherwise qualified to be promoted under the proviso to Rule 28(a)(1) of K.S. & S.S.R. and therefore, their promotion as on 16.9.1985 having been properly effected, could not have been upset by Ext.P11. The petitioners would

also state exemption enjoyed by them, was not a temporary exemption and therefore, their seniority ought to have been maintained as such. On the other hand, Government Pleader invites my attention to Rule 28 of K.S. & S.S.R. and submits that completion of probation of minimum period of two years of duty is an essential requirement for promotion irrespective of the eligibility for exemption ordered by the Government. Government Pleader also submits that the proviso to Rule 28 of K.S. & S.S.R. has relevance only when a junior is promoted in preference to a senior, which according to him, has not happened in this case. I was also referred to Ext.P4, which has been revised by Ext.P11 and it is submitted that it is only a provisional list. According to the Government Pleader, Exts.P1 to P3 disclose that promotion granted to the petitioners were only provisional and as it did not confer any vested right claimed by them, there was nothing irregular in issuing Ext.P11. The Government Pleader also would submit that reference to Ext.P11 discloses that there were valid reasons for calling for a review of seniority and therefore, the Government was justified in ordering the same.

6. I have considered the submissions made by counsel for the petitioners and the Government Pleader and I am satisfied that the petitioners have not made out a case for interference.

7. The first reason that is stated for revising the seniority, as disclosed from Ext.P11 order, is that the employees belonging to SC/ST category, who have not completed two years of duty in the cadre of L.D.Clerks as on the date of occurrence of vacancy were promoted as U.D. Clerks and included in Ext.P4 provisional seniority list. While appreciating the correctness or otherwise of the above statement contained in Ext.P11, it is to be remembered that as per Rule 28(a)(1) of K.S. & S.S.R., no member of service or class of service shall be eligible for promotion from the category to which he was appointed unless he has satisfactorily completed his probation in that category. It is also the accepted position that a person appointed as L.D. Clerk will have to be on probation for two years of duty within a continuous period of three years to be eligible for declaration of satisfactory completion of his probation, apart from passing the obligatory departmental test. In so far as the employees of SC/ST category, who were in service on or before 31.12.1985 are concerned, by virtue of G.O.(P)No.25/97/P&ARD dated 28.11.1997, they are exempted from both probation and departmental tests with effect from 13.1.1972, to be eligible for further promotions. Though exemption to the above extent is granted in their favour, they have to complete a

minimum duty period of two years within a continuous period of three years, as provided for in Rule 28(a)(1) of K.S. & S.S.R. It is not the case of the petitioners that they had completed two years duty period as on 16.9.1985 and if that be the factual position, the respondents cannot be faulted for reviewing the seniority as per Ext.P11.

8. The other reason that is stated in Ext.P11 for reviewing the seniority is that L.D.Clerks belonging to other communities, who were not declared to have satisfactorily completed the period of probation in the L.D. Cadre were promoted as U.D. Clerks and included in Ext.P4. If this statement in Ext.P11 is found to be factual, one cannot quarrel with the correctness of the same in the teeth of Rule 28(a)(1) of K.S. & S.S.R. I do not see any controversy regarding the correctness of this statement. In such circumstances, Ext.P4 required to be corrected instead of allowing the the mistake or illegality to be perpetuated.

9. The other justification offered is that the L.D. Clerks, who have obtained inter district transfer after losing seniority in the recruited district were promoted as U.D. Clerks and placed above those, who were seniors in the transferred district. It cannot be disputed that in view of Rule 28(a)(1) of K.S. & S.S.R. that L.D. Clerks, who obtained inter district transfer are bound to lose their seniority in the recruited district and will be junior-most in the transferred district.

If such L.D. Clerks were promoted without taking into account the fact that they had lost their seniority position on account of the inter district transfer, it is clearly erroneous and needs to be corrected. It was therefore, obligatory for the authorities to have corrected the irregular placement of such L.D. Clerks and restore the position of seniors. Inter district transferees can claim promotion only with effect from the date on which they had become eligible in the transferred district, by satisfying the eligibility laid down in terms of the Rules.

10. Relying on the first proviso to Rule 28(a)(1) of K.S. & S.S.R., it was contended that the effect of Ext.P11 is supercession of the petitioners by their juniors. This point has been answered in the counter affidavit filed by the State by contending that the proviso has application only in the event of supersession by a junior and not in any other case. According to the respondents, by the process of correction, the position was restored to the deserving seniors in the cadre. In such an event, as rightly pointed out by the respondents, the proviso to Rule 28(a)(1) of K.S. & S.S.R. cannot have any relevance.

11. It was argued that the promotion of the petitioners by Ext.P1 to P3 having been effected as early as in 1986 with effect from 16.9.1985 and their seniority having been assigned on that basis, it

ought not have been disturbed by Ext.P11 issued in June, 2002. It is the complaint of the petitioners that it is after a long lapse of time and that too after their seniority positions have been settled and they earned promotions on that basis, and that uncertainty has been created by Ext.P11, upsetting the settled seniority positions. Having considered the submission, I am not in an agreement with the petitioners for the reason that the petitioners got promoted against some of the vacant posts out of 597 posts that were created with effect from 16.9.1985. It was on account of the non-availability of eligible candidates that despite their ineligibility to be promoted, the petitioners were accommodated in the higher post. Orders of promotion evidenced by Exts.P1 to P3 itself discloses that the promotions were under Rule 31 of K.S. & S.S.R. being provisional and subject to review in the future. Therefore, it is not as if the petitioners were not put on notice that their promotion was provisional and subject to review. If that be so, it was always open to the respondents to have effected necessary review on a future date and in the circumstances, lapse of time cannot be held against the first respondent.

12. I am also not impressed by the contention of the petitioners that following the seniority that was assigned to them based on the

promotions of U.D.Clerk posts, they have earned further promotions and therefore Ext.P11 ought not have been issued. From the averments in the counter affidavit and the assertions made by the Government Pleader, it is evident that as a consequence of Ext.P11, the petitioners will not face reversion or any such adverse consequence except re-casting their seniority positions. This demonstrates that the petitioners are not adversely affected by the issuance of Ext.P11 as apprehended by them.

13. On an anxious consideration of the matter, I am satisfied that Ext.P11 deserves to be upheld and I do so. In the result, O.P.No.183323 of 2002 and O.P.No.25863 of 2002 are devoid of any merit and liable to be dismissed and I do so.

Antony Dominic
Judge.

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